

**California Regional Water Quality Control Board
Santa Ana Region**

April 18, 2008

ITEM: * 10

SUBJECT: Order No. R8-2008-0016, ARI Chaney, LLC, Fairway Business
Park, City of Lake Elsinore

SUMMARY

The matter before the Board is to consider adoption of Order No. R8-2008-0016, authorizing the discharge of fill to waters of the State that have been determined to be outside of the U.S. Army Corps of Engineers' jurisdiction and not subject to regulation under Clean Water Act Section 404 (non-federal waters).

BACKGROUND

California Water Code (CWC) Section 13376 states that, "any person discharging dredge or fill material or proposing to discharge dredged or fill material into the navigable waters of the United States within the jurisdiction of this state shall file a report of the discharge in compliance with Section 13260." Section 13260(a) of the CWC requires that any person discharging waste or proposing to discharge waste within any region, other than to a community sewer system, that could affect the quality of the waters of the State, file a report of waste discharge (ROWD). Under federal Clean Water Act (CWA) Section 401, every applicant for a federal permit or license for any activity that may result in a discharge to waters of the United States must obtain State Water Quality Certification (Certification) that the proposed activity will comply with state water quality standards.

Most Certifications are issued in connection with U.S. Army Corps of Engineers (Corps) CWA Section 404 permits for dredge and fill discharges. The State Water Resources Control Board (State Board) and Regional Water Quality Control Boards administer the Certification program in accordance with the requirements of California Code of Regulations Title 23, section 3830 *et seq.* Since November 2003, all Certifications have been issued by the Executive Officer accompanied by authorization to discharge in accordance with State Water Resources Control Board Order No. 2003-0017-DWQ (Order No. 2003-0017-DWQ), "General Waste Discharge Requirements for Dredge and Fill Discharges That Have Received State Water Quality Certification."

Due to recent decisions by the Supreme Court that increasingly have limited the authority of the Corps to regulate discharges of dredge and fill to waters of the U.S., some project proponents find that their proposed discharges of dredge or fill to surface waters of the State are no longer subject to the Corps' jurisdiction (non-federal). As a result, these projects are not subject to a CWA Section 404 permit from the Corps and do not require a Certification. In the absence of the need to obtain a Certification, the State Board has asserted the State's authority to regulate discharges of dredge and fill to waters of the State under the Porter-Cologne Water Quality Control Act.

On May 4, 2004, the State Board issued Water Quality Order No. 2004-0004-DWQ, "Statewide General Waste Discharge Requirements for Dredge and Fill Discharges to Waters Deemed by the U.S. Army Corps of Engineers to be Outside of Federal Jurisdiction (Order No. 2004-0004-DWQ). Numeric impact thresholds limit the application of Order No. 2004-0004-DWQ to relatively small discharges of fill.

On August 29, 2007, Regional Board staff received an application for Certification from ARI Chaney, LLC. In the application, ARI Chaney, LLC proposes to discharge fill to a total of 0.68 acre of waters of the State, including 0.07 acre of waters of the U.S. as part of the construction of a storm drain outfall to the Lake Elsinore Outlet Channel and 0.61 acre of non-federal waters of the State. The waters of the State are located on an 18-acre property bounded by Chaney Street, the Lake Elsinore Outlet Channel, the 3rd Street Channel, and an existing business park bisected by Birch Street (33 deg. 40.96 min. N/-117 deg. 20.27 min. W). Due to the proposed discharge of fill to non-federal waters of the State, Regional Board staff has accepted the application for Certification as a Report of Waste Discharge pursuant to CWC Section 13260.

The discharges will occur as part of the development of Fairway Business Park. The project consists of the construction of 20 buildings totaling 279,445 square feet of light industrial use, to be constructed in three phases. The project includes the construction of storm drain inlets in Birch Street to the proposed outfall in the Lake Elsinore Outlet Channel. The discharges of fill to waters of the U.S., proposed as part of the outfall, have received Regional Board authorization through the issuance of a Certification by the Executive Officer on March 5, 2008.

The non-federal waters proposed for fill on the property are 35 seasonal pools scattered throughout the site and a ponded area at the end of Birch Street. Of the thirty-five seasonal pools, five were found to contain prey species (common fairy shrimp) in support of the wildlife habitat (WILD) beneficial use. The ponded area (including one of the five seasonal pools) contains 0.61 acre of wetlands supported by nuisance flow from Birch Street and regular fire-fighting equipment test discharges from the local fire department. The five seasonal pools total 0.35 acre.

The property lies north of the Elsinore Groundwater Management Zone. In a letter dated March 15, 2008, the U.S. Army Corps of Engineers (Corps) determined that all of the surface waters on the property were not subject to their jurisdiction under CWA Section 404 (Corps' file no. 200602103 – JPL).

As a result of Board staff review of the report of waste discharge, Board staff has identified non-water contact recreation (REC-2), wildlife habitat (WILD), and groundwater recharge (GWR) as existing or potential beneficial uses for the ponded area and the five the seasonal pools supporting prey species. Board staff was unable to identify meaningful beneficial uses for 30 of the 35 seasonal pools. These 30 pools pond water for short durations as commonly occurs following rain events, however there is no indication that the hydrologic conditions are sufficient to support meaningful beneficial uses.

Board staff has determined that the discharge to the ponded area and the five seasonal pools would affect the waters' beneficial uses. Board staff has determined that the Board cannot authorize the discharge in accordance with Order No. 2004-0004-DWQ

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because the discharge, totaling 0.61 acre, exceeds an impact threshold of that Order (0.2 acre). Consequently, the discharge will need to be authorized by individual waste discharge requirements. In addition, Board staff has determined that the wetlands on the project site are 'accidental' and that the State "no-net-loss" policy, a part of the California Wetlands Conservation Policy, should not apply.

ARI Chaney, LLC proposes to mitigate impacts to beneficial uses as the result of the proposed discharges of fill to the ponded area by paying an in-lieu fee to the Santa Ana Watershed Association towards the eradication of 0.5 acre of invasive plant species in the San Jacinto Watershed. There is no similar, readily-available mechanism to mitigate the impacts to the beneficial uses of the seasonal pools in the Santa Ana Region. Therefore, ARI Chaney, LLC is proposing to create or restore seasonal pools on property owned or controlled by the Western Riverside County Regional Conservation Authority (RCA). RCA is a joint-powers authority that is responsible for administering the Western Riverside County Multi-Species Habitat Conservation Plan (MSHCP). As part of that responsibility, the RCA is assembling a wildlife reserve and has acquired lands for that purpose. Regional Board staff and representatives of ARI Chaney, LLC met with RCA staff on January 14, 2008 to discuss the possibility of RCA administering an in-lieu fee program for the creation or restoration of seasonal pools, including the additional acquisition of property above that needed for the MSHCP. RCA staff declined to take on these roles, but agreed to provide available information to assist dischargers and allow dischargers access to RCA properties in order to evaluate candidate sites and undertake seasonal pool creation or restoration efforts on a case-by-case basis.

ARI Chaney, LLC representatives submitted a mitigation plan on March 24, 2008 describing their proposal to create a minimum of 0.35 acre of seasonal pools that will support common fairy shrimp. The site(s) will be at a suitable location on RCA reserve lands in the San Jacinto Watershed. Once identified, the proposed location(s) of the site(s) will be submitted for approval. The site(s) will be selected based on suitable soils and hydrology but the success criteria will be based on the pools' demonstrated ability to support the common fairy shrimp.

In comparison with other compensatory mitigation efforts, Regional Board staff anticipates that the costs of locating and monitoring a suitable site will be disproportionate to the level of effort needed to create a seasonal pool capable of supporting common fairy shrimp. In addition, a suitable site may be capable of supporting the creation of additional pools beyond the obligation of the discharger. As a result, significant economies-of-scale may be achieved by combining or coordinating mitigation projects among dischargers. At the least, once a site is identified, other dischargers may utilize the work completed by ARI Chaney, LLC in order to meet their own mitigation obligations for the fill of other seasonal pools.

Other discharges that will occur as part of the development of Fairway Business Park are construction and post-construction (urban) discharges of storm water runoff. Both discharges are addressed by State Board Water Quality Order No. 99-08-DWQ, "General Permit for Discharges Associated with Construction Activity" (Order No. 99-08-DWQ) and Regional Board Order No. R8-2002-0011, NPDES Permit No. CAS618033, commonly known as the Riverside County Urban Storm Water Runoff Permit, and subsequent renewals. A Storm Water Pollution Prevention Plan (SWPPP) will be developed and a final Water Quality Management Plan (WQMP) has been prepared. Typical construction best management practices (BMPs) will be employed to remove

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pollutants in storm water runoff. Site plans, provided as part of the Report, indicate that vegetated swales, pre-filtered using storm drain inlet filters, will be used to remove pollutants in discharges from the project. Additional BMPs are identified in the SWPPP and final WQMP.

Pursuant to CEQA, the City of Lake Elsinore prepared a Negative Declaration (ND) and adopted it on November 27, 2007. The City's ND has been considered in the preparation of Order No. R8-2008-0016.

RECOMMENDATION

Board staff recommends that the Board adopt Order No. R8-2008-0016.

Comments were solicited from the following agencies and parties:

U.S. Army Corps of Engineers, Los Angeles District
Department of Fish and Game
U.S. Fish and Wildlife Service
U.S. Environmental Protection Agency, Supervisor of the Wetlands Regulatory Office
State Water Resources Control Board, Department of Water Quality, Water Quality
Certification Unit
Western Riverside County Regional Conservation Authority

California Regional Water Quality Control Board
Santa Ana Region

Order No. R8-2008-0016

Waste Discharge Requirements

for

ARI Chaney, LLC
Fairway Business Park, City of Lake Elsinore

The California Regional Water Quality Control Board, Santa Ana Region (hereinafter Board), finds that:

1. ARI Chaney, LLC (hereinafter, discharger) proposes to discharge fill to 0.68 acre of waters of the State as part of the development of the Fairway Business Park in the City of Lake Elsinore.
2. Fairway Business Park involves the construction of 20 buildings totaling 279,445 square feet of light industrial use, to be constructed in three phases. The project includes the construction of storm drain inlets in Birch Street to a proposed outfall in the Lake Elsinore Outlet Channel. Fairway Business Park is located at the terminus of Birch Street and is generally bounded by the 3rd Street Channel, the Lake Elsinore Outlet Channel, and Chaney Street within Section 31 and an un-sectioned portion of Townships 5 and 6 South, Range 4 West, as shown on the U.S. Geological Service *Lake Elsinore, California* quadrangle (33 deg. 40.96 min. N/-117 deg. 20.27 min. W).
3. The Board commonly regulates discharges of dredge or fill to waters of the State through the issuance of Clean Water Act (CWA) Section 401 Water Quality Standards Certifications (Certifications) where the discharge is also subject to regulation by the U.S. Army Corps of Engineers (Corps). These Certifications are accompanied by authorization to discharge in accordance with State Water Resources Control Board Order No. 2003-0017-DWQ (Order No. 2003-0017-DWQ), "General Waste Discharge Requirements for Dredge and Fill Discharges That Have Received State Water Quality Certification. This occurs when the receiving water is both a water of the State as defined by the California Water Code and a water of the U.S. under CWA Section 404. In the absence of an applicable federal permit or license, the Board regulates the proposed discharge to waters of the State through the issuance of Waste Discharge Requirements, or a waiver thereof.
4. In a letter dated August 3, 2006, the Corps determined that, of the 0.68 acre of waters of the State proposed for fill, 0.61 acre of waters of the State were not subject to their jurisdiction under CWA Section 404 (non-federal waters). However, 0.07 acre of fill associated with the construction of a storm drain outfall to the Lake Elsinore Outlet Channel is subject to the Corps' jurisdiction under CWA Section 401. The Executive Officer authorized the discharge of fill to the Outlet Channel with the issuance of a Certification on March 5, 2008.

5. The remaining non-federal waters of the State consist of a 0.61-acre wetland area which includes one of five seasonal pools that total 0.35 acre. The wetland is formed as the result of nuisance flow discharges from Birch Street and fire-fighting equipment test dischargers by the local fire department.
6. Based on the applicant's biological assessment, beneficial uses of the waters of the State that may be impacted by the proposed discharge of fill are:
 - a. Wildlife Habitat (WILD);
 - b. Non-contact Water Recreation (REC-2) and
 - c. Groundwater Recharge (GWR).
7. Waste Discharge Requirements (WDRs) are necessary to address impacts of the fill on the beneficial uses of waters of the State.
8. This Order regulates the discharge of fill material to waters of the State that are not within the Corps' CWA Section 404 jurisdiction (non-federal). The discharger submitted a Report of Waste Discharge on August 29, 2007.
9. The discharger has committed to mitigate direct impacts to waters of the State by paying an in-lieu fee to the Santa Ana Watershed Association towards the eradication of 0.5 acre of invasive plant species in the San Jacinto River watershed and to the creation of 0.35 acre of seasonal pools capable of supporting common fairy shrimp.
10. Pursuant to CEQA, the City of Lake Elsinore adopted a Negative Declaration (ND) for Fairway Business Park on November 27, 2007. The Board has considered the City's ND and there are no un-mitigated significant impacts on water quality as a result of the proposed project.
11. The Board has considered anti-degradation pursuant to State Board Resolution No. 68-16 and finds that the discharge is consistent with those provisions.
12. The Board has notified the discharger and other interested agencies and persons of its intent to prescribe waste discharge requirements for the discharge and has provided them with an opportunity for public hearing and opportunity to submit their written views and recommendations.
13. The Board, in a public meeting, heard and considered all comments pertaining to the discharge.

IT IS HEREBY ORDERED that the discharger, in order to meet the provisions contained in Division 7 of the California Water Code and regulations adopted thereunder, shall comply with the following:

A. DISCHARGE SPECIFICATIONS:

1. No activities associated with the project shall cause or threaten to cause a nuisance or pollution as defined in Section 13050 of the California Water Code.
2. The discharge of any substance in concentrations toxic to animal or plant life is prohibited.
3. The groundwater in the vicinity of the project shall not be degraded as a result of the project activities or placement of fill for the project.
4. The discharge of fill materials shall be limited to inert materials, as defined in Section 20230, Division 2, Title 27. The discharge of fill material other than native soil shall be only with the prior approval of the Executive Officer.

B. DISCHARGE PROHIBITIONS:

1. The direct discharge of wastes, including rubbish, refuse, bark, sawdust, or other solid wastes into surface waters or at any place where they would contact or where they would be eventually transported to surface waters, including flood plains, is prohibited.
2. The discharge of floating oil or other floating materials from any activity in quantities sufficient to cause deleterious bottom deposits, turbidity, or discoloration in surface waters is prohibited.
3. The discharge of silt, sand, clay, or other earthen materials from any activity in quantities sufficient to cause deleterious bottom deposits, turbidity, or discoloration in surface waters is prohibited.
4. Discharges of wastes or pollutants to surface waters, unless otherwise regulated by a separate National Pollutant Discharge Elimination System (NPDES) permit, are prohibited.

C. PROVISIONS:

1. The discharger shall compensate for permanent impacts to beneficial uses of the ponded area by paying an in-lieu fee to the Santa Ana Watershed Association towards the eradication of 0.5 acre of invasive plant species in the San Jacinto River watershed. The fee payment shall include a minimum of six years of follow-on maintenance. Evidence of the payment shall be provided to the Executive Officer by June 18, 2008.
2. The discharger shall compensate for permanent impacts to the beneficial uses of the seasonal pools by creating a minimum of 0.35 acre of seasonal pools, demonstrably capable of supporting common fairy shrimp at a site (or sites) subject to approval by the Executive Officer.

- a. The area of the created seasonal pools shall be measured based on an ordinary high water mark created during a rain season whose total seasonal rainfall is less than one standard deviation from the local average seasonal rainfall.
 - b. Water in the created seasonal pool shall not be contained by structures that are subject to failure in the event of overflow.
 - c. The earthwork for the created seasonal pool shall not adversely affect the beneficial uses of downstream receiving waters (i.e. withhold or divert water from an adjacent seasonal pool).
3. Grading at the project site is prohibited until a suitable mitigation site is approved by the Executive Officer. The seasonal pools must be constructed within 180-days of the approval of the mitigation site by the Executive Officer.
4. The discharger shall maintain a copy of this Order at the site so that it is available to site operating personnel at all times. Key operating personnel shall be familiar with its content.
5. The discharger shall remove from the site any waste or fill material found to contain substances that may have a deleterious effect on water quality, and dispose of unacceptable wastes in a manner acceptable to the Executive Officer.
6. The discharger must comply with all of the requirements of this Order. Any violation of this Order constitutes a violation of the California Water Code and may constitute a violation of the CWA and its regulations, and is grounds for enforcement action, termination of this Order, revocation and re-issuance of this Order, denial of an application for re-issuance of this Order, or a combination thereof.
7. The discharger shall take all reasonable steps to minimize or prevent any discharge that has a reasonable likelihood of adversely affecting human health or the environment.
8. The provisions of this Order are severable, and if any provision of this Order, or the application of any provisions of this Order to any circumstance, is held invalid, the application of such provision to other circumstances, and the remainder of this Order shall not be affected thereby.
9. The filing of a request by the discharger for modification, revocation and re-issuance, or termination of this Order or a notification of planned changes or anticipated noncompliance does not stay any requirements of this Order.
10. The requirements prescribed herein do not authorize the commission of any act causing injury to the property of another, nor protect the discharger from liabilities under federal, state, or local laws, nor guarantee the discharger a capacity right in the receiving waters.

11. This Order does not convey any property rights of any sort, or any exclusive privilege.
12. This Order is not transferable to any person except after notice to, and approval by, the Executive Officer. The Board may require modification or revocation and re-issuance of this Order to change the name of the discharger.
13. In the event of any change in control or ownership of land or waste discharge facility presently owned or controlled by the discharger, the discharger shall notify the succeeding owner or operator of the existence of this Order by letter, a copy of which shall be forwarded to the Board.
14. The Board and other authorized representatives shall be allowed:
 - a. Entry upon premises where a regulated facility or activity is located or conducted, or where records are kept under the requirements of this Order;
 - b. Access to copy any records that are kept under the requirements of this Order;
 - c. To inspect any facility, equipment (including monitoring and control equipment), practices, or operations regulated or required under this Order; and
 - d. To photograph, sample and monitor for the purpose of assuring compliance with this Order.

I, Gerard J. Thibeault, Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of an Order adopted by the California Regional Water Quality Control Board, Santa Ana Region, on April 18, 2008.

Gerard J. Thibeault
Executive Officer